BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

KENNETH L. STALEY
Claimant
VS.

SEARS, ROEBUCK & COMPANY
ST. FRANCIS HOMES
Respondents
AND

ALLSTATE INSURANCE COMPANY
HARTFORD ACCIDENT & INDEMNITY
Insurance Carriers
AND

KANSAS WORKERS COMPENSATION FUND

Docket No. 169,148 and 170,412

ORDER

ON the 18th day of November, 1993, the application of the claimant for review by the Workers Compensation Appeals Board of an Award entered by Administrative Law Judge George R. Robertson on October 15, 1993, came regularly on for oral argument by telephone conference.

APPEARANCES

The claimant appeared by his attorney, Russell B. Cranmer, of Wichita, Kansas. The respondent, Sears, Roebuck & Company, and insurance carrier, Allstate Insurance Company, appeared by their attorney, James M. McVay, of Great Bend, Kansas. The respondent, St. Francis Homes, and insurance carrier, Hartford Accident & Indemnity, appeared by their attorney, John W. Mize, of Salina, Kansas. The Kansas Worker Compensation Fund appeared by its attorney, Jerry Moran, of Hays, Kansas. There were no other appearances.

RECORD

The record as specifically set forth in the Award of the Administrative Law Judge is herein adopted by the Appeals Board.

STIPULATIONS

The stipulations as specifically set forth in the Award of the Administrative Law Judge are herein adopted by the Appeals Board.

ISSUES

Docket No. 169,148

(1) Did claimant meet with personal injury by accident that arose out of and in the course of his employment?

(2) If so, what is the nature and extent of claimant's disability.

(3) Is claimant entitled to future medical benefits?

Docket No. 170,412

(1) Did claimant meet with personal injury by accident that arose out of and in the course of his employment?

(2) Was claimant an employee under the provisions of the workers compensation act?

(3) Did the claimant file a timely written claim?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, and in addition to the stipulations of the parties, the Appeals Board makes the following findings of fact and conclusions of law:

(1) The Workers Compensation Appeals Board on review of any act, finding, award, decision, ruling or modification of findings or awards of the Administrative Law Judge, shall have the authority to grant or refuse compensation, or to increase or to diminish any award of compensation or to remand any matter to the Administrative Law Judge for further proceedings. 1993 Session Laws of Kansas, Chapter 286, Section 53(b)(1).

(2) Claimant, Kenneth L. Staley, alleged an injury arising out of and in the course of his employment with Sears, Roebuck & Company on February 20, 1992. This injury allegedly occurred when claimant was lifting a tire in order to evaluate the appropriate service needed on a vehicle.

(3) While lifting this tire, claimant either felt a small twinge in his low back, an ache in his back like a muscle pull, or a severe and sudden onset of pain significant enough to bring tears to his eyes.

(4) Claimant continued to perform the regular duties of his job on February 20, 21, 22, and 23, without complaint. This incident was not reported to any management level employee at Sears until February 25, 1992.

(5) On February 24, 1992, the claimant proceeded to the St. Francis Boys Home where he was hired to do minor repairs. After working for approximately one and one-half hours on the day in question, claimant lifted a five-gallon bucket containing either mud or paint and felt an additional injury to his back described as a twinge, a stab of pain, or a sudden pain which was not as intense as that experienced at Sears. This incident was not reported to claimant's supervisor at St. Francis Boys Home on the day of the alleged injury.

(6) On the night of February 24, 1992, claimant traveled from his home in Ellsworth, Kansas, to Downs, Kansas. After spending the night at his brother's house in Downs, he awoke the next morning with severe pain in his lower extremities including radiculopathy into his leg. The pain was so severe claimant's nephew was forced to drive him to Kensington, Kansas, where the nephew loaded 160 pounds of deer meat into claimant's car and drove him back to Downs, Kansas. Claimant then drove himself from Downs, Kansas, to his home in Ellsworth.

Upon returning to Ellsworth, claimant contacted Sears and advised them of his inability to work and further advised them of his alleged injury on February 20, 1992. Claimant advised Lee Mason, the store manager, that he had pulled a muscle on February 20, while working at Sears and may or may not have told him about the St. Francis incident.

(7) Claimant advised Mr. Jim Hale, the automotive manager, that he felt a small twinge in his back on the day of the alleged injury at Sears and advised Mr. Hale of the trip to Kensington, Kansas, to get the venison but failed to advise Mr. Hale of the incident at St. Francis.

(8) Claimant contacted Sharon Ringler, the manager at St. Francis Boys Home, and advised her of the injury suffered at St. Francis. He was advised St. Francis carried no workers compensation insurance on him as he was an independent contractor.

(9) Prior to the pain episode experienced in Downs, Kansas on February 25, 1992, claimant neither requested nor sought medical care for the alleged injuries of February 20, 1992, and February 24, 1992.

(10) Claimant sought treatment from Dr. Kepka after the Downs, Kansas incident, and ultimately was treated by Dr. Ali B. Manguoglu.

Docket No. 170,412

(11) Claimant alleges he was an employee of the St. Francis Boys Home, and should be entitled to workers compensation benefits for the alleged injury of February 24, 1992.

(12) Claimant contracted with Sharon Ringler at the St. Francis Boys Homes. Miss Ringler showed him what jobs to perform. Claimant then was allowed to set his own hours and decide what tools to use on the job. He had no daily supervision on the job, the method of performing work was up to him, he kept no time card but instead kept track of his own time, and the only contact he would have with Miss Ringler was when she would occasionally walk by and comment on his work. Claimant was paid an hourly rate of $6.00 per hour and no taxes were withheld from his check by St. Francis.

(13) "[A]n independent contractor is one who, in the exercise of an independent employment, contracts to do a piece of work according to his own methods and who is subject to his employer's control only as to the end product or final result of his work." Krug v. Sutton, 189 Kan. 96, 366 P.2d 798 (1961)

(14) "On the other hand, an employer's right to direct and control the method and manner of doing the work is the most significant aspect of the employer-employee relationship, although it is not the only factor entitled to consideration. An employer's right to discharge the workman, payment by the hour rather than by the job, and the furnishing of equipment by the employer are also indicia of a master-servant relation." Jones v. City of Dodge City, 194 Kan. 777, 402 P.2d 108 (1965).

(15) In Smith v. Brown, 152 Kan. 758, 108 P.2d 718 (1940), evidence of payment at an hourly rate for services was introduced in support of employer-employee relationship, but the Supreme Court determined that the general law was applicable in that it was the question of the right of control which determined the relationship.

(16) The Appeals Board finds the claimant, being under little or no supervision or control by St. Francis Boys Home, and having only to be concerned with the end product or final result, was not an employee, but was instead an independent contractor. Claimant's claim for benefits for this injury are denied.

Docket No. 169,148

(17) The claimant's allegation of an injury on February 20, 1992, at Sears, Roebuck and Company is not well supported. Claimant has described this injury in terms varying from a small twinge to an injury so severe that he was temporarily incapacitated and had tears in his eyes.

(18) Claimant failed to advise anyone at Sears of this injury and continued to perform his regular duties of lifting up to 50 pounds on a regular basis for the next several days without comment to his supervisors and without need for medical attention.

(19) The first medical attention sought by claimant was subsequent to his personal trip to Kensington, Kansas, with the first signs of severe radiculopathy occurring on the morning of February 25, 1992.

(20) K.S.A. 44-501(a) states in part:

> "If in any employment to which the workmen's compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workmen's compensation act. In proceedings under the workmen's compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation by proving the various conditions on which the claimant's right depends."

(21) K.S.A. 44-508(g) defines burden of proof as follows:

> "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true", on the basis of the whole record.

(22) The burden of proof is upon the claimant to establish his right to an award for compensation by proving all of the various conditions on which his right to a recovery depends. This must be established by a preponderance of the credible evidence. Box v. Cessna Aircraft Co., 236 Kan. 237, 689 P.2d 871 (1984)

(23) It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of disability. Tovar v. IPB, Inc., 15 Kan. App. 2d 782, 786, 817 P.2d 212 (1991). The trier of fact is not bound by medical evidence presented in the case and has a responsibility of making its own determination. Id. at 785.

(24) The only medical testimony presented is that of Dr. Ali Manguoglu. Based upon the history presented to him by the claimant, Dr. Manguoglu felt the initial herniation had occurred at Sears. This information was based upon claimant's allegation of a sudden, sharp onset of low back pain with low level continuing pain for several days thereafter. Dr. Manguoglu later testified that, when the claimant felt the initial onset of leg pain, that was when the herniation occurred and the herniation was the cause of claimant's disability. The claimant first experienced leg pain on the morning of February 25, 1992, in Downs, Kansas.

(25) In order for a claimant to collect workers compensation benefits under the Kansas Workers Compensation Act he must suffer an injury arising out of and in the course of his employment.

(26) "The phrase 'out of' the employment points to the cause or the origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises 'out of' employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. An injury arises 'out of' employment if it arises out of the nature, conditions, obligations and incidents of the employment." Newman v. Bennett, 212 Kan. 562, 512 P.2d 497 (1973).

(27) "The phrase 'in the course of' employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer's service." Hormann v. New Hampshire Ins. Co., 236 Kan. 190, 197, 689 P.2d 837 (1984).

(28) The uncontradicted evidence in this case is that the claimant, while alleging an injury on February 20, 1992, failed to seek medical care until after the onset of symptoms in Downs, Kansas, on February 25, 1992. The testimony clearly shows the trip to Downs, Kansas, was of a personal nature.

(29) The claimant's allegations regarding the injury suffered at Sears is contradicted by claimant's own testimony and by the testimony of Mr. Hale and Mr. Mason.

(30) Dr. Manguoglu described claimant's back as being "worn out" which is not unusual for someone involved in manual labor for many years. He further advised that a herniated disc could occur at any time with any lifting injury where, as in this instance, the disc quality is poor and prone to rupture.

(31) The Appeals Board is not persuaded by a preponderance of the credible evidence that claimant suffered an injury arising out of an in the course of his employment on February 20, 1992, while working for Sears, Roebuck and Company.

(32) The failure of the claimant to advise his employer of this incident as well as the failure to seek medical attention until after the non work-related incident in Downs, Kansas, is significant and persuasive that the claimant's back injury did not arise out of and in the course of his employment. Claimant's request for benefits under the Kansas Workers Compensation Act in Docket No. 169,148, is therefore denied.

WHEREFORE, it is the finding, decision and order of the Appeals Board that the Award of Administrative Law Judge George R. Robertson, dated October 15, 1993, is affirmed in all respects and that the claimant, Kenneth L. Staley, shall be and is denied any award against St. Francis Homes for Boys and the Hartford Accident & Indemnity Company, as claimant is not an employee but an independent contractor and thus, not entitled to the benefits of the Kansas Workers Compensation Act; and further finds that the claimant has failed in his burden of proof in showing an injury on February 20, 1992, arising out of and in the course of his employment with Sears, Roebuck and Company and is denied any award against Sears, Roebuck and Company and Allstate Insurance Company.

The Kansas Workers Compensation Fund was dismissed from Docket No. 169,148 by agreed order on September 15, 1993, and from Docket No. 170,412 by agreed order on August 31, 1993, with no liability. The Workers Compensation Fund agrees, per these stipulated orders to be responsible for its own attorney fees.

Fees necessary to defray the expenses of administration of the Workers Compensation Act are assessed against the respondents and insurance carriers, equally, to be paid as follows:

SATTERFIELD REPORTING SERVICE		
Deposition of Dr. Ali Manguoglu, Dated July 27, 1993		$ 254.20
UNDERWOOD AND SHANE		
Deposition of Jim Hale, Dated July 27, 1993		$ 175.90
Deposition of Lee Mason, Dated July 27, 1993		$ 110.60
	Total	$ 286.50
OWENS, BRAKE & ASSOCIATES		
Preliminary Hearing Transcript, Dated December 15, 1992		$ 446.70
Regular Hearing Transcript, Dated March 18, 1993		$ 288.88
	Total	$ 735.58

IT IS SO ORDERED.

Dated this _____ day of December, 1993.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

DISSENT

I dissent from that portion of the majority opinion finding that claimant was not an employee of St. Francis Homes. In my view, the finding is not consistent either with Kansas case law or the intended function and purpose of the Kansas Workers Compensation Act.

With regard to the employment issue, there was no dispute as to any of the material facts presented. Claimant's testimony provided the only evidence. Claimant testified that at St. Francis he did maintenance work such as painting, patching walls, and replacing windows. He described himself as a handyman. He worked on Saturdays and Sundays. He was paid $6.00 per hour. He set his own hours, kept track of his time and turned it in. He used some of his own tools but mostly used theirs. He was told that if he needed help they would get it for him.

It appears he dealt primarily with Sharon Ringler, a woman he described as the manager. The uncontradicted evidence establishes not only that she could but that she did control what jobs were to be done and in what order they were to be done. When he started at St. Francis, she took him around and showed him the repairs she wanted done. Claimant described his initial work assignment as follows:

> "....And I think I took a pen and wrote down on a piece of scratch paper. She wanted the bathroom painted first. She had had a ceiling she wanted repaired first and then paint that room and then I think she said she wanted this other bathroom painted secondly. She described when she wanted and what she wanted and what order she wanted it done." (Claimant's deposition, page 52.)

When asked if there was someone from St. Francis who told him on a daily basis what to do, claimant stated:

> "I think I usually when I went in I usually talked to Sharon and asked her if she wanted me to go ahead and finish this or if she wanted something else done, I believe I did." (Claimant's deposition, page 54.)

In my opinion, this combination of facts clearly establishes that claimant was an employee. Payment by the hour rather than by the completed project and the furnishing of tools are both indicia of an employment relationship. McCarty v. Great Bend Board of Education, 195 Kan. 310, 403 P.2d 956 (1965). The fact that St. Francis would supply the help, if needed, also suggests he was not acting as an independent contractor. See Shindhelm v. Razook, 190 Kan. 80, 372 P.2d 278 (1962); Schroeder v. American Nat'l Bank, 154 Kan. 721, 121 P.2d 186 (1942). Although not expressly addressed in the evidence, the above facts also show a relationship which would be subject to termination at any time. As the Kansas Supreme Court observed in Jones v. City of Dodge City, 194 Kan. 777, 402 P.2d 108 (1965) the ability to terminate the relationship at any time is strong evidence of a right to control which exists in the employment rather than independent contractor relationship.

Kansas appellate courts have repeatedly indicated that right to control the method of performing the work is the primary consideration in determining whether an employment relationship exists for purposes of the workers compensation coverage. Anderson v. Kinsley Sand & Gravel, Inc., 221 Kan. 191, 558 P.2d 146 (1976); Evans v. Board of Education of Hays, 178 Kan. 275, 284 P.2d 1068 (1955). The right to control, not the actual exercise of control, is determinative. See Anderson v. Kinsley Sand & Gravel, supra; Scammahorn v. Gibraltar Savings & Loan Assn., 197 Kan. 410, 416 P.2d 771 (1966); Jones v. City of Dodge City, 194 Kan. 777, 402 P.2d 108 (1965).

Kansas cases do indicate that in order to be significant, the right to control must be a right to control the method or means by which the work is performed, not simply control over the result to be achieved. See Evans v . Board of Education of Hays, supra. Although not specifically stated, this distinction appears to be at least a part of the reason for the majority's decision in this case. The distinction, sometimes described as a distinction between control over the details as opposed to control over the result, is often difficult to make in a meaningful way. See Larson, Workmen's Compensation Law, Vol. 1B, Sec. 43.52 (1993).

One of the problems in applying the distinction is that what may be considered only the manner of performing the work or considered a detail, depends on the scope of the description of the job in the first instance. It is a relative. In this case claimant was asked directly if the methods of performing the work was his decision alone. His testimony illustrates the difficulty. He answered:

> A. The method?
>
> Q. Pardon me, the methods?
>
> A. When you say methods, like whether I painted from the ceiling down or the floor up?
>
> Q. Right, all that?
>
> A. Yeah, that was up to me.

If you describe the claimant's job as a maintenance job, control such as that exercised by a representative of St. Francis over which repair jobs are to be done and in what order they are to be done can be considered control over the method of performing the job. If, on the other hand, you describe the job as a painting job, as claimant seems to assume in his testimony, then perhaps only control over such detail as whether it is done by roller or brush, what type of brush, or where to start on the wall would truly be control over the method of performing the work. I do not, however, think the latter is what is intended by the distinction. Exercise of independent control which may have been exercised by claimant here, is not the type of independence I believe required to make one an independent contractor. The control exercised by St. Francis is the type of control exercised by an employer.

There are some facts or factors presented by the evidence in this case which might suggest an independent contractor relationship. Claimant set his own hours and used some of his own tools. He was not certain whether St. Francis was withholding taxes. He testified that Sharon Ringler did not tell him how to do his painting job. He did not think she would know how. These fact do not, in my opinion, override the other factors.

Finally, as initially indicated, a finding that claimant was an independent contractor is, in my view, inconsistent with the function of the Workers Compensation Act and purpose for the distinction. The Workers Compensation Act is intended to spread the financial burden of on the job injuries to consumers generally by routing it through employers as a cost of doing business. See Larson, Workmen's Compensation Law, Vol. 1B, Sec. 43.52 (1993). Consistent with that purpose, the distinction between an employee and an independent contractor should depend in part upon whether it is reasonable to expect the purported independent contractor to carry the burden of the risk. In this case claimant's relationship with St. Francis and the activities in which he was engaged do not indicate it would be reasonable to expect claimant to assume this burden and for that additional reason claimant should not be considered an independent contractor of St. Francis.

BOARD MEMBER

I concur with the dissent.

BOARD MEMBER

cc: Russell B. Cranmer, 2831 East Central, Wichita, Kansas 67214
James M. McVay, P.O. Drawer 1110, Great Bend, Kansas 67530-1110
John W. Mize, P.O. Box 380, Salina, Kansas 67402-0380
Jerry Moran, P.O. Box 128, Hays, Kansas 67601
George R. Robertson, Administrative Law Judge
George Gomez, Director